87-442
No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

PENNSYLVANIA DRILLING COMPANY, INC.,
Petitioner,

v.

WILLIAM SORBA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

What is the burden of an age discrimination plaintiff to show that an employer's legitimate reason for discharge was pretextual?

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WILLIAM SORBA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Pennsylvania Drilling Company, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 18, 1987.

OPINIONS BELOW

The Panel Opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit") is attached as Appendix A.

The Opinion of the United States District Court for the Western District of Pennsylvania ("District Court") is attached as Appendix B.

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals rendered its judgment on June 18, 1987. Its decision addressed an

important question concerning evidentiary burdens under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA) in a manner conflicting with the decision of a majority of the other United States Circuit Courts of Appeal. The jurisdiction of this Honorable Court is thereby established pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

The ADEA provides:

> It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age . . .

29 U.S.C. §623(a)(1).

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . .

29 U.S.C. §623(f)(1).

STATEMENT OF THE CASE

Factual Background

On April 8, 1983, Petitioner, Pennsylvania Drilling Company, (hereinafter "Pennsylvania Drilling"), a small business, discharged Respondent, William Sorba (hereinafter "Sorba") from his employment as a driller. As a driller, Mr. Sorba had significant supervisory responsibilities, including responsibility for the overall completion of his drilling jobs. Mr. Sorba filed suit asserting that this discharge, which occured when he was 54 years old, was in violation of the Age Discrimination in Employment Act (hereinafter "ADEA").

In response to Sorba's suit, Pennsylvania Drilling articulated legitimate business reasons for the discharge, including:

(1) poor work performance;

(2) complaints about performance by customers;

(3) padding jobs by slowing work activity to obtain extra overtime pay;

(4) disruptive attitude.

These activities and the discharge took place when Pennsylvania Drilling was suffering serious financial losses and in an economic crisis.

Extensive discovery was taken by both parties. Mr. Sorba, in his deposition, admitted complaints from customers and supervisors about his performance during his last three jobs for the company and that very poor results were achieved on these jobs. Mr. Sorba also admitted the financial crisis of the company at this time.

In Answers to Interrogatories, Mr. Sorba suggested that his discharge may have been because the President of Pennsylvania Drilling could not control him.

Mr. Sorba admitted the absence of any direct evidence of age discrimination. Further, Pennsylvania Drilling's statistical evidence that 65% of all Pennsylvania Drilling drillers were over age 40 was not contested. However, Mr. Sorba claimed that the poor results on these jobs were not his fault, disputed that he was padding any job and challenged the perception of his attitude as "disruptive." He cited the deposition of various supervisors who admitted that there were some on-site physical problems at the jobs. However, they restated a belief that Mr. Sorba was not performing as well as he could have.

DISTRICT COURT DECISION

The District Court granted Pennsylvania Drilling's Motion for Summary Judgment. As the District Court stated:

> Even if plaintiff performed admirably under the most adverse of circumstances yet defendant held him responsible for the poor results or, in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp. 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be subjective, short-sighted and narrow minded as long

as age is not a determinative factor.) Moreover, if we accept everything the plaintiff says as true, this would lead to the conclusion that plaintiff was fired because the boss felt that plaintiff was too independent for the boss to control. This does not establish age discrimination. Taken as a whole, we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age. A mere assertion, conjecture, or speculation by the plaintiff is not sufficient to establish a material factual dispute. (B-5)

THIRD CIRCUIT OPINION

Specifically relying on its decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3rd Cir. 1987), the Third Circuit reversed the summary judgment.[1] The Third Circuit announced its standard to be whether the employee introduced "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [which] reasonably *could* support an inference that the employer did not act for non-discriminatory reasons." *supra*, at 900. In applying this standard, the Third Circuit ignored Mr. Sorba's admissions of poor results on his last three jobs and testimony of supervisors that Sorba's performance was slower than expected. Instead, the Third Circuit focused on Mr. Sorba's "evidence" that his supervisors could have realized the poor results were not his fault. This evidence consisted of statements by Mr. Sorba and by certain supervisors of problems with equipment and job site conditions.

Examining the record in the light most favorable to Sorba, the Third Circuit determined that the testimony of Mr. Sorba's supervisors "was inconsistent regarding whether they believed Sorba's performance

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[1]A Petition for Writ of Certiorari has been filed on *Chipollini, supra*, sub nom. *Spencer Gifts, Inc. v. Chipollini*, No. _____, October term 1987. No disposition on this Petition has yet occured.

caused the unsatisfactory results."[2] The Third Circuit attempted to distinguish the apparently opposite holding of the Seventh Circuit in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980) by asserting that the factual record was different. Relying on *Chipollini, supra*, the Third Circuit reversed Pennsylvania Drilling's summary judgment despite the absence of any nexus between the discharge and age discrimination.

REASON FOR GRANTING THE WRIT

A Conflict Exists Between the Third Circuit and, in part, Fifth Circuit with the majority of Other Circuit Courts as to the Age Discrimination Plaintiff's Burden of Proof of Pretext

A Writ of Certiorari is appropriate in the instant case because a conflict exists between the Third Circuit and certain other Circuits and a majority of the other Circuit Courts of Appeal concerning a major issue of federal law. The question presented is "What evidence must a plaintiff present to satisfy his burden of proof that an employer's legitimate explanations for discharge are pretextual?"

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), this Honorable Court held that an ADEA plaintiff could prove his case by showing that the employer's legitimate reasons for discharge were "unworthy of credence" or pretextual. Guidance by this Honorable Court is needed to resolve conflict in the Circuits and clarify the appropriate burden of proof which plaintiff must meet to make this showing. This is especially critical given the vast number of ADEA lawsuits, the drain of questionable ADEA lawsuits on judicial resources and employer financial stability, and the important right of defendants to

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[2]In viewing the record most favorable to the non-movant Mr. Sorba, the Third Circuit searched for inconsistencies, ignoring numerous statements by supervisors of dissatisfaction with Mr. Sorba's performance. The Third Circuit also ignored the statements of Pennsylvania Drilling's president and supervisors concerning Mr. Sorba's detrimental influence on morale, because such statements were based on hearsay.

summary judgment in assumpsit cases. *See Celotex Corportion v. Catrett*, _____ U.S. _____, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S. Ct. 2505, 107 S. Ct. 2343 (1986).

The Third Circuit decision, in the case at bar, announces a standard which is in conflict with other jurisdictions in the following three ways:

(1) by permitting an inference of age discrimination due to an employee's dispute of the factual basis for the employer's legitimate reason;

(2) by permitting such an inference without any evidence directly or indirectly relating to age; and

(3) by permitting this inference despite uncontraverted admissions by the employee of justifiable non-age related reasons for the discharge.

Each of these three elements of the Third Circuit's analysis in *Sorba* is contradicted by decisions in most other Circuits.

FACTUAL BASIS FOR DISCHARGE

The First, Second, Sixth, Seventh, and Eighth Circuits have all held that the factual basis of the employer's reasons for discharge is not an issue in an age discrimination case. However, the approach of the Third Circuit, permitting an analysis of the factual basis is supported by the Fifth Circuit. The Ninth Circuit, in *Douglas v. Anderson*, 656 F.2d 528 (1981), stated an approach which permits consideration of the factual basis, but only to determine if sufficient evidence exists to establish a legitimate concern of the employer.

As the Seventh Circuit held in *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) *cert. denied*, _____ U.S. _____, 107 S. Ct. 954 (1987), in affirming summary judgment for the defendant employer, "The Court does not sit as a super-personnel department that re-examines an entity's business decisions. The question is not whether the Tribune [employer] exercised prudent business judgment, but

whether Dale [the employee] has come forward to refute the articulated legitimate reasons for his discharge." *See also Kephart, supra*, at 1223 (The ADEA "was not intended as a vehicle for judicial review of business decisions.")

Similiarly, the First Circuit affirmed summary judgment for the employer in *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987), holding that "evidence contesting the factual underpinnings of the reason for the discharge proferred by the employer is insufficient" to meet the burden of proof of age discrimination. *See also Gray v. New England Telephone & Telegraph*, 792 F.2d 251, 255 (1st Cir. 1986) ("Finally, although Gray did present evidence contesting the factual underpinnings of the reasons proferred by NET for firing Gray, these, without more are insufficient in the case to present a jury question."); *White v. Vathally*, 732 F.2d 1037, 1042 (1st Cir.) *cert. denied*, 469 U.S. 933, 105 S. Ct. 331 (1984) ("Our review does not extend to the quality of business judgment . . .").

The Second Circuit in *Parcinski v. Outlet Company*, 673 F.2d 34, 37 (2nd Cir. 1982) stated that "The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions." In *Parcinski, supra*, a jury verdict for an age discrimination plaintiff was reversed because plaintiff's evidence put the business decisions of the employer in a bad light, but did not establish age discrimination.

In *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986), the Sixth Circuit granted judgment notwithstanding the verdict for the employer holding that "the factfinder may not focus on the soundness of the employer's business judgment."

The Eighth Circuit in *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1166 n.8 (8th Cir. 1985) granted judgment notwithstanding the verdict to the employer noting that "The ADEA is not intended to be used as a means of reviewing the propriety of a business decision on the part of the employer."

The Third Circuit standard, which authorizes a judicial inquiry into the factual basis for the employer's legitimate business reasons, is also applied by the Fifth

Circuit. Although citing the general language that the ADEA is not a vehicle for second guessing business decisions, in *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), the Fifth Circuit required such an inquiry. In reversing the District Court's grant of summary judgment, the Fifth Circuit relied upon plaintiff employee's proffer of evidence that plaintiff was, in fact, better qualified than retained younger employees. The Fifth Circuit held that the factfinder is entitled to conclude that the employer's articulated reasons are pretextual if it determines that the plaintiff was clearly better qualified than other employees[3]. "If the factfinder determines that Thornbrough [plaintiff] was clearly better qualified than the employees who were retained, it is entitled to conclude that the Railroad's [employer's] articulated reasons are pretexts." *Thornbrough, supra*, at 647.

In *Douglas, supra*, at 533 n.5, the Ninth Circuit rejected an approach, such as the Third Circuit's, which weighs if the articulated reason was factually correct. Instead, the Ninth Circuit suggests that the focus of the inquiry on pretext (concerning poor performance) is "whether there was sufficient evidence of unsatisfactory performance to be a legitimate concern of his employer." Using this standard, disputes as to the factual basis of the employer's legitimate reason preclude summary judgment only in the absence of some evidence to support the employer's concern.

A Writ of Certiorari is appropriate in the instant case to permit this Court to review this conflict between the Circuit Courts and resolve whether a dispute of the factual basis for the employer's legitimate business reason satisfies the employee's burden to show that the employer's reason is "unworthy of credence." *Burdine, supra.*

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[3]The Fifth Circuit candidly admits, at 647 of its Opinion that its decision stretches the principle of the ADEA "to its limit."

AGE DISCRIMINATION NEXUS

The second element of the Third Circuit's decision, concerning the absence of any requirement of an age discrimination nexus, directly conflicts with decisions from the United States Court of Appeals for the First, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. Contrary to the Third Circuit's decisions in the case at bar and *Chipollini, supra*, these other Circuits require that a plaintiff must show a link between the alleged pretext and age discrimination to survive summary judgment.

The First Circuit, in *Dea, supra*, at 15 and *White, supra*, at 1043, held that "refuting or questioning the defendant's articulated reason" or "merely casting doubt on the employer's articulated reason" does not meet the burden of demonstrating age discrimination. *See also Gray, supra*, at 255-256 (that the discharge may have been arbitrary or due to ill will does not show that age was a motivating factor).

In *Dale, supra*, at 465, the Seventh Circuit expressly held that an age discrimination plaintiff must "establish a nexus between his evidence and age discrimination."

Decisions from the Sixth, Eighth, Ninth and Eleventh Circuits also indicate a conflict with the Third Circuit standard. In *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982), the Sixth Circuiit affirmed summary judgment because only personal conclusions by the plaintiff suggested that age was a factor in the decision. The Eighth Circuit in *Leichihman v. Pickwick International and American Can Co.*, 814 F.2d 1263, 1270 (8th Cir. 1987) held that "plaintiff must make *some* additional showing that age was a determinating factor." In *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), the Ninth Circuit required "specific, substantive evidence of pretext and that age was a determining factor." In *Pace v. Southern Railway System* 701 F.2d 1383, 1391 (11th Cir.), cert. denied, 464 U.S. 1018 (1983), the Eleventh Circuit permitted summary judgment in the absence of evidence "which might infer that age was even a factor in the decision."

A Writ of Certiorari is appropriate to resolve the conflict among the Circuits concerning the requirement of a nexus to age as a reason for the discharge.

PRETEXT OF SOME BUT NOT ALL BUSINESS REASONS

The third element of the Third Circuit's standard, permitting an inference of age discrimination where some but not all of the employer's legitimate reasons for discharge are allegedly in dispute, is at odds with this Court's decision in *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S. Ct. 2943 (1978). In *Furnco, supra*, at 577, this Honorable Court explained the reasons underlying the *McDonnell Douglas* standard and inference of discrimination:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters v. United States, supra*, at 358 n.44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a *totally arbitrary* manner, without any underlying reasons, especially in a business setting. Thus, when ***all*** legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with ***some*** reason, based his decision on an impermissible consideration such as race. (Emphasis added)

The Third Circuit's opinion in the case at bar reveals, on its face, certain uncontested legitimate reasons for the discharge. At page 9 of the Opinion, the Third Circuit states that "Sorba admits that the three jobs produced poor results for the company and that he

received complaints about his performance from both customers and his supervisors on the Little Blue Run job." (A-9). The Third Circuit also notes that Mr. Sorba's supervisors stated "that Sorba's performance on the three drilling operations was slower than they expected." (A-8). Although these admitted circumstances provide legitimate business reasons for the discharge, the Third Circuit reversed summary judgment holding that the dispute as to whether Sorba was ***responsible*** for these poor results permitted an inference of age descrimination. Petitioner respectfully submits that Sorba's responsibility for the poor results would constitute a separate and additional business reason. Discharge for the poor results occurring, whether or not due to Mr. Sorba's fault, is a legitimate business reason.[4] Mr. Sorba at no time proffered evidence that younger employees with equally poor results were not discharged.

Decisions from the First, Sixth and Seventh Circuits are at variance with the Third Circuit approach. In *Dea, supra*, the First Circuit affirmed summary judgment despite the employee's contention that the articulated business reason, misuse of gasoline, was pretextual and a cover-up of management errors. As the First Circuit stated at 15:

> "To be sure, Dea and defendants disagreed as to who was at fault for the misappropriation of gasoline. But even if Dea convinced a jury that he was fired to protect higher-ups from blame in the gasoline scandal, this would not show age discrimination. *It would merely provide another reason, totally unrelated to age, for his discharge.*" (Emphasis added)

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[4]In addition, in answers to interrogatories, Sorba provided an additional legitimate business reason—the President's inability to control his actions. *See* Opinion of District Court at 6, 7, (B – 5). If the employee states a legitimate business reason for his discharge, this should preclude an inference of age discrimination since a non-age related explanation for the employer's actions is provided. cf. *Furnco, supra*.

Similarly, in *Ackerman, supra*, at 70 and *Dale, supra*, at 465 n.9, the Sixth and Seventh Circuits respectively held that no showing of age discrimination was made where employees challenged the articulated legitimate reasons as pretextual, but offered other legitimate reasons (personality conflicts) as explanations for the discharge.

A Writ of Certiorari is appropriate to resolve the conflict between the Circuits and the Third Circuit's misapplication of this Court's *Furnco* decision.

CONCLUSION

Taken as a whole, the three elements of the Third Circuit standard precludes an ADEA defendant from obtaining summary judgment in virtually every case. As long as a plaintiff disputes the factual basis for one of the legitimate business reasons for discharge, the employer would be precluded from summary judgment. Particularly concerning small businesses with informal personnel policies, this standard is unduly burdensome. As the Seventh Circuit noted in *Kephart, supra*, at 1219, the availability of summary judgment in age discrimination suits is critical to avoid " the harassment of small businesses having informal personnel practices with unfounded suits."

Petitioner respectfully submits that there is confusion among the Circuits concerning the standard of proof for employees seeking to show that employers' legitimate reasons are pretextual. Clarification by this Honorable Court of the *Burdine* standard is appropriate, particularly in view of the too generous standard of the Third Circuit.

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JONES, GREGG,
CREEHAN & GERACE

By: _____
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DATED: September 14, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3688

WILLIAM SORBA,
Appellant

vs.

PENNSYLVANIA DRILLING COMPANY, INC.

Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Civil No. 85-819)

Argued May 12, 1987

Before: GIBBONS, *Chief Judge*,
MANSMANN, *Circuit Judge*,
KATZ, *District Judge**

(Filed June 18, 1987)

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*Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This appeal raises once again issues most recently addressed by us in *Chippolini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987), regarding the appropriateness of summary judgment for the defendant employer in employment discrimination cases where the plaintiff has produced evidence to establish a *prima facie* case pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a nondiscriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence.

We find that the record before us contains "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) nondiscriminatory reasons." *Id.* at 900. Since the district court incorrectly required that the ADEA plaintiff's evidence establish a direct inference that the defendant discharged him because of his age, we will reverse the entry of summary judgment for the defendant employer.

I.

After 27 years of employment as a driller with Pennsylvania Drilling Company, William Sorba was discharged at the age of 54. Sorba avers in his deposition that younger drillers were retained and that, after Sorba's termination, younger drillers were called back from layoff, rehired or promoted from helper to driller.

Sorba brought suit in district court alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1932) (as amended) contending that his age was a factor in the employer's decision to discharge him. Pennsylvania Drilling answered that Sorba had been dismissed for unsatisfactory performance on his last three jobs between 1981 and April 18, 1983 the date of his discharge. After discovery, the employer moved for summary judgment and the district judge granted the motion. The court found that the employer had articulated valid non-discriminatory reasons for Sorba's discharge and that Sorba's factual allegations and evidentiary proffers did not present a triable issue of fact. Sorba appealed.

The district court order was entered on October 21, 1986. During the pendency of this appeal, we filed our opinion in *Chipollini* in which we explained that an ADEA plaintiff need not produce direct evidence of age discrimination in order to resist a motion for summary judgment based on the defendant employer's proffer of a non-discriminatory reason for the plaintiff's discharge. 814 F.2d at 894. Because this is a recurring area of confusion, we now reiterate much of what we said in *Chipollini* concerning the interrelationship of the shifting burden of production in discrimination cases with the burden of the employer as movant for summary judgment.

II.

Under the ADEA, a plaintiff must prove that age was a determinative factor in the defendant employer's decision to dismiss the employee. *See e.g., Duffy v. Wheeling Pittsburgh Steel Corp.* 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). A plaintiff may, of course, prove his case by direct evidence. However, in the absence of direct evidence a plaintiff may establish a *prima facie* case indirectly by proving by a preponderance of the evidence that the employee (1) belongs to a protected class; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. *See Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 796 (1986).

If the plaintiff succeeds in proving a *prima facie* case,the burden of production then shifts to the defendant to articulate some legitimate non-discriminatory reason for the discharge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the proffered reasons were not the employer's true reasons. *Id.*

In addition to establishing a *prima facie* case by indirect proof, an ADEA plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age. *Chipollini*, 814 F.2d at 898. "[W]hen all legitimate reasons for rejecting an (employee) have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as

(age)." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original).

III.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S. Ct. 2548, 2553 (1986).

The ultimate burden of proof at trial will remain with Sorba, who must convince the factfinder that it is more likely than not that his age was a determinative factor in Pennsylvania Drilling's decision to terminate him. *See e.g. Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d at 1395. It is clear that the employer will be able to "articulate" a legitimate, nondiscriminatory reason for Sorba's dismissal. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). Therefore Sorba's trial burden will include the requirement either to discredit the employer's proffered reasons or to prove by direct evidence that his age was a factor in the decision to dismiss him. *Id.*

Nonetheless, the burden of persuasion on summary judgment remains unalterably with Pennsylvania Drilling as movant. The employer must persuade the court that even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to Sorba, no reasonable jury could find in his favor.

"[T]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose

to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." *Chipollini*, 814 F.2d at 899. Where, as here, a plaintiff has offered no direct evidence of discriminatory motive, questions regarding summary judgment on the issue of intent are subsumed under the inquiry into employer pretext. *Id.* at 898. If an employee introduces "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for non-discriminatory reasons," *id.* at 900. the district court may not grant an employer's motion for summary judgment.

When ruling on a motion for summary judgment, the judge's role "is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2511 (1986). The existence of a factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment only if the dispute is "genuine" and the fact is "material". *Id.* at 2510.

Thus where the factual dispute concerns employer motive, clearly a material issue in an ADEA case, the problem is to determine whether the dispute is genuine, that is, "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* This inquiry "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 2512. In an ADEA case, the plaintiff must prove his case by a preponderance of the evidence. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 542

(1984). Thus, where the employer has produced evidence of a non-discriminatory motive for the employee's dismissal, the appropriate summary judgment question is whether the evidence in the record *could* support a reasonable jury finding either that the plaintiff has shown age discrimination directly or that the plaintiff has shown that the employer's proffered nondiscriminatory reason is unworthy of credence. *Chipollini*, 814 F.2d at 898.

Our review is plenary. We must apply the same test the district court should have used initially to determine whether there is a genuine issue as to any material fact. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

IV.

It is undisputed that Sorba is able to introduce evidence to support a *prima facie* case of age discrimination under the ADEA. Pennsylvania Drilling claims Sorba was discharged for poor performance and has proffered evidence of unsatisfactory results on three of Sorba's drilling jobs between 1981 and the time of his discharge in 1983.

The decision to discharge Sorba was made by Tom Sturges, President of Pennsylvania Drilling. In his deposition, Sturges asserted that the decision was based on information to the effect that Sorba had performed poorly on his last three jobs, *i.e.*, that he padded jobs, accrued unnecessary overtime, caused morale problems by criticizing the company and refused on occasion to take direct orders. Deposition of Thomas B. Sturges, *reprinted in* Appendix at 216a-282a. The jobs were known as Little Blue Run, Emsworth Lock and Dam, and Hussey Metals. Sturges testified that he was not personally familiar with

Sorba's performance on these jobs and had based his decision to discharge Sorba on information received from Jack Woleslagle, Vice President and Manager of Division One, the test boring division, and Jim Dravenstott, Sorba's immediate supervisor. The depositions of both Woleslagle and Dravenstott are of record. Sturges also assertedly relied on information from Jim Adams, allegedly Sorba's foreman on the Hussey Metals job, but the record contains no statement by Adams. Sorba asserts that the criticism of his performance is unfounded. He asserts that he was dismissed because of his age.

As we must on summary judgment, we review the evidence in the light most favorable to the non-movant. Dravenstott and Woleslagle both stated that Sorba's performance on the three drilling operations was slower than what they expected. However, Dravenstott also testified that the Emsworth Dam job went as well as could be expected and, when asked whether Mr. Sorba's poor work performance caused problems with the job, he answered, "No, I don't think so." Deposition of James Dravenstott, *reprinted in* Appendix at 363. As to the Hussey Metals job, Mr. Dravenstott commented, "I don't know whether I had a real problem with his performance . . It wasn't going as good as I wanted it to. Whether it could have been done better or not, I don't know." *Id.* at 367. Dravenstott testified that Sorba's alleged detrimental influence on morale due to derogatory comments was "hearsay" and "rumors". *Id.* at 368. He admitted that he could not state for sure that the company lost money because of Sorba's performance. *Id.* at 371.

Woleslagle stated that he had "no problems" with Sorba. Deposition of Jack W. Woleslagle, *reprinted in* Appendix at 14, 15. He confirmed that on the Emsworth Dam project Sorba had encountered steel in

the hole and that there had been problems at the bottom of the shaft with a large void. *Id.* at 309. He testified that he was not aware that Sorba had created morale problems, criticized the company or attempted to have other employees extend work unnecessarily. *Id.* at 320-321. Woleslagle stated that he was unable to confirm that the company had lost money due to Sorba's performance on any job. *Id.* at 370.

Sorba admits that the three jobs produced poor results for the company and that he received complaints about his performance from both customers and his supervisors on the Little Blue Run job. Deposition of William Sorba, *reprinted in* Appendix at 181, 182. However, he claims that factors beyond his control were responsible. In answer to the defendant's interrogatories, Sorba asserted that no one in the company had more experience in drilling than he had and that he was always given the toughest jobs. He asserted that he was given no warning or reprimand before being discharged. For each of the three jobs which he allegedly mishandled, Sorba provided specific explanations which he asserts establish that it was not his fault that the specified jobs were not performed.[1]

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[1]Sorba asserted that on the Emsworth Dam project he had encountered problems with flooding, equipment failures, river traffic and adverse soil conditions. Defendant's Interrogatories to Plaintiff, *reprinted in* Appendix at 55. As for Little Blue Run, he asserted that he was hindered by a faulty derrick and defective legs on the rig, an ineffective system for anchoring barges and adverse weather conditions. *Id.* at 56. With reference to the Hussey Metal project, Sorba alleged that he encountered equipment failures and that the drilling was impeded by a large amount of steel and other foreign substance in the hole. He also alleged that his helpers on the job were inexperienced.

At his deposition, Sorba again noted the extent to which equipment problems caused delays. Deposition of William Sorba,

Were we at the trial stage, the issue would be whether the employer discharged Sorba because it believed that he was not performing satisfactorily or whether the employer was using this explanation as a pretext for another reason which the jury may infer to be age discrimination. It is undisputed that Sorba has offered no direct evidence of purposeful age discrimination. Consequently, the issue on summary judgment is whether Sorba has pointed to evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge which *could* support an inference that the employer did not act for nondiscriminatory reasons. *Chipollini*, 814 F.2d at 900.

In its consideration of Pennsylvania Drilling's summary judgment motion, the district court ignored the plaintiff's option to use indirect evidence in meeting his burden. In reviewing Sorba's submissions the district court wrote:

> [P]laintiff does not dispute that the last three jobs plaintiff worked on for the company produced poor results. Rather, he says these results were not his fault. This however, is irrelevant. Even if plaintiff performed admirably under the most adverse of circumstances, yet defendant held him responsible for the poor results, or in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp.

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reprinted in Appendix at 121. He recited his efforts to get other employees to take better care of the equipment and indicated that he was so concerned about the economic problems of the company that he had asked the company to convene a meeting of drillers and helpers to discuss a pay cut. *Id.* at 163. He also indicated that he tried to get the employer to change or improve the equipment. *Id.* at 121, 122.

> 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be short-sighted and narrow minded as long as age is not a determinative factor). . . *Taken as a whole we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age.*

Sorba v. Pennsylvania Drilling Co., No. 85-819, slip opinion at 30, (W.D. Pa. October 21, 1986) (emphasis added).

The district court's error in this case is the same as that of the district court in *Chipollini*. To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.[2]

In this case, Sorba's trial burden will be to show that it is more likely than not that the employer did *not* discharge him because of the poor results on his last three jobs. Therefore, to defeat a summary judgment motion, the evidence need only establish a reasonable inference that the employer did *not* dismiss Sorba because of his poor performance.

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[2]Pennsylvania Drilling urges us to adopt the result in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), an ADEA case in which the appellate court upheld a summary judgment for the defendant employer. The allegations in *Kephart* were very similar to those made by Sorba. However, the state of the record was different in *Kephart*. The court found that the plaintiff had not established a *prima facie* showing of discrimination and, having had a chance to examine the movant's witnesses at their depositions, the plaintiff had been unable to introduce *any* evidence indicating that their testimony was untrue. *Id.* at 1225. (emphasis added). Consequently, the reasoning in *Kephart* is inapposite here.

Sorba has introduced evidence to dispute the fact that his supervisors were dissatisfied with his work. Sorba does not dispute the fact that there were poor results on his last three jobs. He has proffered evidence, however, that his supervisors realized that the poor results were not his fault. Upon examination at their depositions, the testimony of the movant's witnesses was inconsistent regarding whether they believed Sorba's performance caused the unsatisfactory job results.

This is not to say that the jury must decide whether the poor results were, in fact, Sorba's fault. The jury must only assess the employer's credibility with respect to its proffered reason. The jury need only decide whether the employer dismissed Sorba because of reports from his supervisors that they believed Sorba to be responsible for the poor results. If not, it is more likely than not that the employer based his decision on an impermissible consideration such as age. *Furnco*, 438 U.S. at 577.

We find that Pennsylvania Drilling has failed to meet its burden on summary judgment. The record contains indirect evidence which, if credited by the factfinder at trial, would be sufficient to support a finding that it is more likely than not that the employer did not act for its proffered reason. Therefore, we will reverse the entry of summary judgment for Pennsylvania Drilling and remand the case for trial.

A True Copy:

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Clerk of the United States Court of Appeals
for the Third Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF PENNSYLVANIA

WILLIAM SORBA,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 85-819
PENNSYLVANIA DRILLING	:	
COMPANY, INC.	:	
Defendant.	:	

OPINION

WEBER, D.J.

Plaintiff brings this action alleging that defendant discriminated against him based on his age when the defendant company discharged him in August, 1983. Defendant has filed motions for summary judgment and in limine asking this court to dismiss this action or, alternatively, to exclude certain evidence plaintiff relies on and intends to present at trial.

Motion in Limine

Defendant's motion in limine seeks to bar plaintiff from introducing and relying on the following witnesses and evidence:

1. The discharge of Charles Triplett by Pennsylvania Drilling in 1976;
2. The discharge of Mr. Earl Hoffman in 1978;
3. Plaintiff's job performance on jobs prior to the Little Blue Run job in 1981; and
4. Plaintiff's job performance on jobs for other employers subsequent to his termination by Pennsylvania Drilling Company, Inc. on August 8, 1983.

In support of this motion, defendant has submitted statistical evidence establishing that 65% of the drillers (plaintiff's job classification) in defendant's employ at the time of plaintiff's discharge were over the age of 40 and thus in the protected class. Moreover,

defendant offers evidence of a legitimate business reason which relates primarily to plaintiff's activities on three jobs since 1981: Little Blue Run, Emsworth Lock and Dam, and Hussey Metals.

Defendant argues that evidence regarding the discharge of Mr. Tripplett and Mr. Hoffman, which are remote in time and unrelated to plaintiff's discharge, do not establish a pattern of age discrimination under any statistical model and should be excluded under F.R.E. 403. We agree that the evidence should be excluded. Plaintiff has not shown that a statistical pattern exists. The incidents are unrelated in time, and defendant offers evidence that it had a legitimate business reason for these discharges to rebut plaintiff's age discrimination allegations. Allowing evidence of these incidents would require the trying of three discrimination cases. Plaintiff's case is the only one we have before us, and, in the absence of any pattern, the evidence regarding the termination of Mr. Tripplett and Mr. Hoffman will be excluded.

Defendant argues that evidence of plaintiff's job performance prior to 1981 and following August, 1983 should be excluded as pertaining to an irrelevant time period and therefore not probative as to the central issue of whether age was a determinative factor in his discharge. In response, plaintiff represents that since defendant has claimed that plaintiff's poor job performance on three jobs led to his discharge, he should be permitted to give evidence of his overall work performance to show "pretext." Plaintiff represents that his testimony would cover specific job assignments that he had over the last years of his employment with defendant, and that any testimony regarding subsequent job performance would relate solely to the issue of damages.

In this action, plaintiff has the ultimate burden of proof. Plaintiff "may carry this burden *directly* by adducing evidence such as age-biased statements by his superiors which might persuade the court . . . [or] he may carry this burden *indirectly* by showing that the employer's proffered explanation for his dismissal should not be believed." *Keller v. Bluemle*, 371 F. Supp.

364, 369 (E.D. Pa. 1983) *aff'd.* 735 F.2d 1349 (3d Cir. 1984); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Plaintiff's testimony regarding his overall job performance during his last years of his employment with defendant may provide some circumstantial evidence to rebut defendant's legitimate business reason for the termination. Therefore, we find it relevant and we will allow it. Regarding evidence of subsequent job performance, we note that the quality of such performance is not necessary to show mitigation of damages, but the fact of subsequent employment is relevant. Therefore, relevant facts pertaining to subsequent employment will be admitted for the limited purpose of proving damages and mitigation hereof.

Motion For Summary Judgment

Defendant has moved for summary judgment, supporting his motion with three depositions and answers to interrogatories. Plaintiff has opposed the motion with evidentiary material of his own. Summary judgment is a drastic remedy and should only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Conley v. Gibson*, 355 U.S. 41 (1957); *Hollinger v. Wagner Mining Equipment Company*, 667 F.2d 402, 405 (3d Cir. 1981). In deciding this motion, we must resolve any doubts against the defendant and draw all reasonable inferences in a light most favorable to the plaintiff. *Keller v. Bluemle, supra.*

Plaintiff indicates:

1. He was born on March 6, 1929 and discharged by defendant on August 8, 1983, thus he was 54 years old at the time of his discharge and within the protected class;

2. He was qualified for the job;

3. He satisfied the normal requirements of the job; and

4. Drillers who were younger than him were retained and/or called back from layoff, rehired or promoted from the status of a helper to a driller after his termination.

See deposition of William Sorba; Requests for Admissions. By these assertions, plaintiff satisifes his initial burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Defendant has come forward with evidence of its legitimate business reason for the discharge, indicating that at the time of his discharge, plaintiff was not satisfying the normal job requirements despite his overall qualifications for the job and his skill as a driller. Specifically, defendant contends that plaintiff performed poorly on his last three major jobs: Little Blue Run, Emsworth Lock and Dam, and Hussey Metals. Defendant also contends that plaintiff "padded" jobs, accrued unnecessary overtime, criticized the company causing employee morale problems, and refused direct orders of his supervisors on the Hussey Metals job. Under the *McDonnell Douglas* formula, this satisfied defendant's burden which is to come forward with evidence of a legitimate business reason for the adverse action. See *Burdine*, 450 U.S. at 254-55.

Plaintiff now attempts to resist summary judgment by raising a material issue of fact for trial. Plaintiff disputes the defendant's proferred legitimate reasons for the dismissal by offering the following indirect evidence of "pretext":

1. Plaintiff had a long history with the company and was the most experienced driller at the time of his discharge.

2. He was always given the toughest jobs.

3. He was given no warning of discharge or reprimand.

4. He was a "company man" and acted in the best interests of the company over time.

5. While plaintiff agrees that there were poor results on the three jobs cited by defendant, plaintiff states that these were due to problems beyond his control such as seepage and flooding, equipment failures, river traffic, as well as adverse soil conditions.

6. Plaintiff said he complained from time to time about equipment failures and problems with safety and dangerous conditions.

7. Plaintiff believes that Tom Sturges, President of the Company and a much younger man, fired him because Sturges generally lacked experience and felt that he (Sturges) could not control plaintiff due to plaintiff's broad experience, years of service with the company, and association with Sturges' father. *See* Sorba deposition and Plaintiff's Answers to Defendant's Interrogatories.

Plaintiff has the burden of proving that age was a determinative factor in his discharge by a preponderance of the evidence. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 728 F.2d 1393 (3d Cir. 1984), *cert. denie* 105 S. Ct. 542 (1984); *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980). In order to survive summary judgment, plaintiff must produce sufficient evidence to show a material factual issue. There is no dispute that plaintiff had a long history with the company. Nor is there any dispute about his experience. Furthermore, plaintiff does not dispute that the last three jobs plaintiff worked on for the company produced poor results. rather, he says these results were not his fault. This, however, is irrelevant. Even if plaintiff performed admirably under the most adverse of circumstances, yet defendant held him responsible for the poor results or, in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp. 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be subjective, short-sighted and narrow minded as long as age is not a determinative factor.) Moreover, if we accept everything the plaintiff says as true, this would lead to the conclusion that plaintiff was fired because the boss felt that plaintiff was too independent for the boss to control. This does not establish age discrimination. Taken as a whole, we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age. A mere assertion, conjecture, or speculation by the plaintiff is not sufficient to establish a material factual dispute. Summary judgment will be granted in favor of defendant.

WILLIAM SORBA, *Plaintiff,*	:	
v.	:	CIVIL ACTION NO. 85-819
PENNSYLVANIA DRILLING COMPANY, INC. *Defendant.*	:	

ORDER

NOW this 21st day of October, 1986, IT IS ORDERED that defendant's motions in limine and for summary judgment are GRANTED in accord with the accompanying opinion. This ends all further proceedings in this action.

GERALD J. WEBER
United States District Judge

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